No. 82-1527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE ASSOCIATED PRESS,

Petitioner,

—against—

CHARLES J. BUFALINO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* BY THE NEW YORK TIMES COMPANY, NATIONAL BROADCASTING COMPANY, INC., GANNETT CO., INC., DOW JONES & COMPANY, INC., NEWSWEEK, INC., THE MIAMI HERALD PUBLISHING COMPANY, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The *amici* are all nationally distributed news organizations (and one association of journalists that includes members throughout the nation) who join together to move the Court for leave to file a brief as *amici curiae* in support of the petition for a writ of certiorari in this case. The written consent of the petitioner, The Associated Press, has been obtained and has been filed with the clerk of this Court. The consent of the respondent, Charles J. Bufalino, Jr., has been requested and refused. As nationally distributed news organizations, and an association of news

reporters from across the country, movants believe that the decision below will harm their ability to serve the public. Movants believe that their brief *amici curiae* will aid this Court by demonstrating the inconsistency of the decision below with decisions of this Court and by clarifying the negative impact of the decision below on national news organizations.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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This brief is submitted on behalf of the New York Times Company, National Broadcasting Company, Inc., Gannett Co., Inc., Dow Jones & Company, Inc., Newsweek, Inc., the Miami Herald Publishing Company, and the Reporters Committee for Freedom of the Press, as *amici curiae*, in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed on behalf of the Associated Press ("AP").

Interest of *Amici Curiae*

The *amici* are publishers, broadcasters, and an association of journalists. The New York Times Company and its subsidiaries publish, *inter alia, The New York Times* and thirty newspapers around the country and own and operate television and radio stations and a cable television system. National Broadcasting Company, Inc. operates television and radio stations. Gannett Co., Inc. and its subsidiaries publish eighty-nine daily and thirty-two non-daily newspapers throughout the country and own and operate television and radio stations. Dow Jones & Company, Inc. and its subsidiaries publish *The Wall Street Journal,* twenty-one daily newspapers and one weekly magazine. Newsweek, Inc., publishes *Newsweek* magazine. The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc. publishes *The Miami Herald.* The Reporters Committee for Freedom of the Press is a legal defense and research fund devoted to the protection of the First Amendment and freedom of information rights of the working press of all media.

Each of the *amici* believes that the misreading of decisions of this Court, including *New York Times Co.* v. *Sullivan* itself, by the United States Court of Appeals for the Second Circuit will limit substantially the ability of the press to report and the public to learn about significant ongoing events of enormous public interest and concern. In addition, the summary rejection by the Second Circuit of the interpretation of Pennsylvania's official records privilege by the United States Court of Appeals for the Third Circuit introduces a new uncertainty into the federal courts' exercise of diversity jurisdiction, an uncertainty that is especially disturbing in the area of libel and that is contrary to the policies articulated by this Court and by the Second Circuit itself.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' Misinterpretation of *New York Times Co.* v. *Sullivan* Raises Important Issues Concerning the Scope of First Amendment Protection in Libel Actions That Should Be Resolved by This Court.

The constricted nature of First Amendment protection afforded by the Court of Appeals' decision is, quite simply, contrary to *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), itself, let alone later cases decided by this Court. The district court had granted summary judgment for the defendant based on its finding that plaintiff Bufalino, the solicitor of the Borough of West Pittston, Pennsylvania, was a public official as defined in *Sullivan.* Plaintiff's concession that he could not prove that the allegedly defamatory statements had been made with actual malice, as defined in *Sullivan* and its progeny, satisfied the district court that summary judgment was appropriate.

The reversal by the Court of Appeals of the judgment of the district court was bottomed on an issue neither briefed nor argued by the parties. According to the Court of Appeals, AP was not entitled to rely upon any *Sullivan* protection it might otherwise have been entitled to since it did not "directly or impliedly identify the plaintiff as a public official, and there is no showing that the plaintiff's name is otherwise immediately recognized in the community as that of a public official." (16a)[1] Thus, even if plaintiff were a public official for purposes of *Sullivan* (an issue the Court of Appeals did not reach) and even if plaintiff, as

[1] Citations herein to material printed in the Appendix to the Petition appear as "——a."

here, disclaimed any ability to demonstrate actual malice, summary judgment was held to be unavailable. The Court of Appeals expressly noted that its decision was directly contrary to that of the Massachusetts Supreme Judicial Court, *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975), and other federal decisions, *e.g., Goodrick* v. *Gannett Co.*, 500 F.Supp. 125 (D. Del. 1980). (18a)

Sullivan arose out of publication of an advertisement in *The New York Times* that made no reference by name either to the Montgomery Commissioner who supervised the Police Department or to his official position.[2] Although there was some testimony at trial that the advertisement was understood to relate to Sullivan, 376 U.S. at 258—testimony required to demonstrate that the advertisement was "of and concerning" the plaintiff—there was none that met the test established by the opinion of the Court of Appeals that plaintiff's name itself must be "immediately recognized in the community as that of a public official." (16a) There is, in fact, no reason to believe that Sullivan could have come close to meeting that test. Yet Sullivan,

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[2] The relevant language from the advertisement stated:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> * * *
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ." 376 U.S. at 257-58 (emphasis in original).

unnamed in the *Times* advertisement which led to his action, was, of course, treated as a public official.

Similarly, in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), a case relied upon in the Court of Appeals opinion, the allegedly libelous language in question[3] made no reference even to the name of the public official. Nor was any showing whatsoever made to the effect that plaintiff's name was widely known, let alone immediately recognized, in his community as that of a public official. Yet in *Rosenblatt*, a former supervisor of a local recreation area was held to be a public official for purposes of *Sullivan* and thus obliged to prove actual malice in order to recover.

Again, in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the language at issue with respect to a deputy sheriff named Thompson was, at best, indefinite with respect to his position, and defendant made no showing of the notoriety of plaintiff within the community.[4] Nonetheless, plaintiff was

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[3] The language was as follows:

"Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent **BETTER** than last year.

"When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane [Chairman of the new commission] and rest of commission, and Mr. Warner [respondent's replacement as Supervisor] wrought to make such tremendous difference in net cash results?" 383 U.S. at 78-79.

[4] The language was as follows:

"Now, we knew that this safe was gonna be moved that night, but imagine our predicament, knowing of Ed's connections with the Sheriff's office through Herman Thompson, who made

held to be a public official and obliged to meet the actual malice test of *Sullivan*.[5]

Reference to cases such as *Sullivan*, *Rosenblatt* and *St. Amant* is useful not only for the narrow point for which they are cited above, but for a broader proposition that is utterly at odds with the ruling of the Court of Appeals. It is that *Sullivan* and its progeny are not to be treated, as we understand the Court of Appeals to have done, as burdensome intrusions upon the claims of individual reputation, intrusions that must virtually be confined to their facts. The theory that underlies *Sullivan* is, after all, one that welcomes "debate on public issues" that is "uninhibited, robust, and wide-open" and that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. When, as here, just such speech has been engaged in by charging one who was a town attorney with having alleged mob ties, *Sullivan* should not be read so woodenly as to deprive AP of First Amendment protection simply because it failed to identify the official in his official capacity or to demonstrate the breadth of his local notoriety.

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recent visits to the Hall to see Ed. We also knew of money that had passed hands between Ed and Herman Thompson . . . from Ed to Herman. We also knew of his connections with State Trooper Lieutenant Joe Green. We knew we couldn't get any help from there and we didn't know how far that he was involved in the Sheriff's office or the State Police office through that, and it was out of the jurisdiction of the City Police." 390 U.S. at 728-29 (footnote omitted).

[5] The Court of Appeals cited a footnote in *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300 n.4 (1971), for the proposition that this Court "has not yet ruled upon the significance of a news report's failure to identify a public officeholder as such." (17a) The footnote in *Ocala* referred to simply observed that although both the trial judge and intermediate court of appeal below had partially rested their conclusion that *Sullivan* did not apply on the ground that the plaintiff's status as mayor or candidate for county tax assessor had not been mentioned in the article, "[t]he respondent has not pursued that theory here."

Put differently, what underlies *Sullivan* is the notion that intense public debate relating to the competence of public officials is part of the "central meaning" of the First Amendment. *Id.* at 273. *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191. If that is so, must the protections of *Sullivan* be limited to cases in which there is identification, as such, of the public officials? Or is it not far more consistent with *Sullivan* to conclude that public debate inexorably leads to more debate and that debate about Bufalino's alleged mob ties may reasonably be expected to lead to public examination of what Bufalino does and where he does it? Given the fact that *any* statements which "touch on an official's fitness for office" have long been held to be protected by *Sullivan, Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 273-74 (1971), the *amici* submit that the Court of Appeals decision's mistreatment of *Sullivan* and other decisions of this Court is worthy of review by this Court, and, upon review, reversal.

II.

The Refusal of the Court of Appeals to Defer to the Definitive Interpretation of the Pennsylvania Official Records Privilege by the Court of Appeals for the Third Circuit Is Contrary to the Principles Underlying the Proper Method of Determining State Law by a Federal Court in a Diversity Action Articulated by This Court in *Erie R.R. Co.* v. *Tompkins* and Subjects Libel Defendants to Unnecessarily Heightened Dangers of Forum Shopping.

In reversing the district court's grant of summary judgment, the Court of Appeals rejected the interpretation of Pennsylvania's official records privilege recently set forth by the Third Circuit in *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981). This occurred notwithstanding the fact that Pennsylvania is within the borders of the Third Circuit and that the Third Circuit's ruling on Pennsylvania law predated that of the Second Circuit. Such a cavalier disregard for the need for uniformity in the federal courts' interpretation of state law in diversity actions and for the increased probability of forum shopping engendered by its decision contravenes well-established decisions of this Court and a decision of the Second Circuit itself.

The district court concluded that two statements in the AP articles at issue were the subject of the complaint. One stated that plaintiff was related to an organized crime figure named Russell Bufalino, the other that plaintiff had alleged "mob ties." Based on a wide range of official documents submitted to the Court on both issues, the district judge concluded that the requirements of Pennsylvania's official records privilege had been met and that summary judgment was thus appropriate.

In its opinion reversing Judge Werker's ruling, the Court of Appeals did not suggest that the official records proffered had failed to support the language at issue. Nor did it conclude that AP's statements with respect to the official records were, to any degree, unfair or inaccurate. Instead, the Court of Appeals concluded that since AP had disclosed that its dispatch had been based upon material provided by confidential informants whom AP had refused to identify, consistent with Pennsylvania law, *no amount* of after-discovered official records could suffice to permit AP to avail itself of the privilege. The Court of Appeals explicitly and necessarily disagreed with the decision of the United States Court of Appeals for the Third Circuit in *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981), on the issue of whether Pennsylvania law required proof of actual reliance upon the official records produced to bring into play the official records privilege. *Medico*, which was adhered to by the district court, held no such reliance was necessary. The Court of Appeals disagreed, saying:

> "As authority for this ruling the [trial] Judge cited *Medico* v. *Time, Inc.*, 643 F.2d 134, 146-47 (3d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981). In *Medico*, the plaintiff argued that the defendant could claim the § 611 [official records] privilege only if, in preparing its report, it had actually relied upon the official document in question. The Third Circuit, citing *Binder* v. *Triangle Publications*, 442 Pa. 319, 275 A.2d 53 (1971), held for the defendant and stated that Pennsylvania law 'squarely contradicts' the argument that actual reliance is necessary.
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> "We believe that *Medico* reads *Binder* for much more than it's worth. In *Binder*, the Pennsylvania Supreme Court held the privilege available where the defendant's reporter, who did not attend a judicial

> proceeding, based his report of the proceeding on statements given him by a third party who did attend. Said the Pennsylvania Court: '[H]ow a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question.' 442 Pa. at 327, 275 A.2d at 58. Taken in context, we believe this statement means only that the privilege is available where a reporter who purports to report on an official proceeding does not have personal knowledge of the proceeding but instead relies on an intermediary who does. That is, in *Binder* the reporter ultimately relied on information obtained at the official proceeding, he believed he was relying on official information, and he wrote a report purporting to summarize the proceeding. In contrast, if *Medico* is correct in holding that reliance is not required, a reporter's unsubstantiated defamatory statements, made independent of any report of public proceedings, would be privileged if after-the-fact the reporter could find some official record embodying his statements. We do not believe that the privilege should be applied to the latter situation." (10a-11a)

By its summary rejection of the determination by the Third Circuit as to the meaning of Pennsylvania law, the Court of Appeals created a situation where the location of the forum of a lawsuit may well determine its outcome. Given the *Bufalino* ruling, a federal court located in New Jersey would be bound to apply the broad *Medico* interpretation of Pennsylvania law to a libel lawsuit before it; a federal court across the river in New York, applying the same state's law, would apply a different rule. The Court of Appeals' creation of such a patchwork of precedent encouraging libel plaintiffs to choose not only between state

and federal courts but between federal courts in different districts runs contrary to the policies of fairness that this Court consistently has held should govern diversity jurisdiction. *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 747 (1980) ("discouragement of forum-shopping and avoidance of inequitable administration of the laws" are the "twin aims" of *Erie*); *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (same); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 74-75 (1938). Indeed, the Second Circuit itself previously had recognized the difficulties inherent in such a decision in *Factors, Etc., Inc.* v. *Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). In *Factors*, the Court of Appeals was confronted in a diversity case with an issue of Tennessee law. Based on the principles governing the exercise by the federal courts of post-*Erie* diversity jurisdiction, the Court of Appeals held that a decision of the Court of Appeals for the Sixth Circuit, whose boundaries include Tennessee, on the same issue of Tennessee law as was before the Second Circuit should be accorded conclusive deference. *Factors* was not cited or discussed in the opinion of the Court of Appeals in this case.

The dangers of inequity and forum shopping engendered by the Court of Appeals' opinion are heightened in the area of libel where lawsuits, under current law, may be brought in almost any forum that a plaintiff chooses. *Cf. Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982), *cert. granted*, 103 S.Ct. 813 (1983); *Jones* v. *Calder*, 138 Cal.App.3d 128, 187 Cal.Rptr. 825 (1982), *petition for cert. pending*, 51 U.S.L.W. 3651 (U.S. Feb. 22, 1983). This aspect of the Court of Appeals' ruling is particularly troubling to the *amici*, who are currently subject to lawsuits in many different forums based on their nationwide distribution. It is risky enough to be subjected to libel litigation under the varying laws of fifty states; it is all

but absurd if the interpretation of each state's law is to differ from one federal court to another with no deference to a ruling of a Court of Appeals as to the law of a state within its boundaries. By substituting its own view of Pennsylvania law for that of the Third Circuit, and ignoring this Court's rulings that interpretations of state law by federal judges located in that state and presumably more familiar with that state's law are entitled to special deference, *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 280 (1942) (per curiam), the Court of Appeals has added a new twist to the old *Erie* knot, one that can be unraveled only by review by this Court.

CONCLUSION

For the foregoing reasons, the petition of AP for a writ of certiorari should be granted.

Respectfully submitted,

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